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No. 97-1451

In The
Supreme Court of the United States
October Term, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF THE PETITIONER

Nancie G. Marzulla**
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April 6, 1998

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31pp

[CONTINUED FROM COVER]

BRIEF *AMICI CURIAE* OF

AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP
AMERICAN HOMEOWNERS FOUNDATION
AMERICAN LOGGERS SOLIDARITY
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS
COMMITTEE FOR A CONSTRUCTIVE TOMORROW
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
EAST TEXAS HERITAGE ASSOCIATION
FRONTIERS OF FREEDOM
HILL COUNTRY HERITAGE ASSOCIATION
MAINE CONSERVATION RIGHTS INSTITUTE
NATIONAL CENTER FOR POLICY ANALYSIS
NORTHWEST LEGAL FOUNDATION
PEOPLE FOR THE WEST! ACCORD CHAPTER
RIVERSIDE COUNTY FARM BUREAU
STOP TAKING OUR PROPERTY and
TRANS TEXAS HERITAGE ASSOCIATION
TEXAS WILDLIFE ASSOCIATION

QUESTION PRESENTED FOR REVIEW

Does the Commerce Clause permit the federal government to regulate land-use activities pursuant to the Endangered Species Act in order to protect the habitat of a species located solely within the borders of a single state?

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions that take private property for public use without just compensation and defeat the system of limited government inherent in the Commerce Clause and the Tenth Amendment. Defenders devotes a significant portion of its resources to constitutional litigation and has participated in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, *Bennett v. Spear*, *Suitum v. Tahoe Regional Planning Agency* and *Boerne v. Flores* when they were before this Court.

American Association for Small Property Ownership (Front Royal, VA) represents the interests of landlords, property owners and real estate investors. Its goal is to restore common sense and equity to federal, state and local regulations, tax and

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[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their

liability and other laws that unconstitutionally impinge on the right of landlords, property owners and real estate investors to build wealth and success by the beneficial and productive use of property.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping people make the most well-informed decision when purchasing a home.

American Loggers Solidarity (Forks, WA) is a broad-based organization comprised of individuals, small businesses, corporations, and elected officials at the city, county, and state levels in seven states. ALS believes in the sanctity of individual rights as provided in the United States Constitution, and recognizes that individual rights are the cornerstone of democracy and must be protected by elected officials, bureaucracies, and the judicial system.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide organization whose missions is to secure private property guarantees provided in the Bill of Rights.

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members or counsel) contributed financially to the preparation of this

CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

Committee for a Constructive Tomorrow (Washington, D.C.) is a non-profit public interest organization founded in 1985 that promotes free-market and safe technological solutions to current consumer and environmental concerns.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education, and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

East Texas Heritage Association (Pecan Gap, TX) is an association of landowners in northeast Texas dedicated to the preservation of private property rights. ETHA has actively challenged the erosion of private property rights in northeast Texas resulting from public trails being constructed on private property under the authority of the Rails To Trails Act.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of

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brief.

the Founding Fathers as articulated in the Constitution to ensure the maximum amount of freedom for every American.

Hill Country Heritage Association (London, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species. Members of HCHA embrace the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine. MECRI keeps landowners informed of government policy, including proposed and existing programs that undermine private property rights. MECRI encourages private conservation and wise use land policies. MECRI is also the sponsor of the annual Conservation Rights Congress, which addresses contemporary land rights issues.

National Center for Policy Analysis (Dallas, TX) was established in 1983 in an effort to provide policy makers with timely, detailed and accurate information about the impact of proposed policies legislation. NCPA seeks to promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

Northwest Legal Foundation (Minot, ND) is dedicated to promoting proper and responsible exercise of government

authority and safeguarding individual rights and freedoms guaranteed by our Federal and State Constitutions. The Foundation's goal is to be a major force in the legal arena to champion the causes of the private enterprise system, economic and individual freedoms, limited government and private property rights.

People for the WEST! ACCORD Chapter (Scottsdale, AZ) is a grassroots organization that was created to support western communities against the overreaching hand of government. Its membership believes that people who own and depend on the land make better stewards of the environment, and that mankind has the ability to solve any legitimate environmental problems through sound scientific means.

Riverside County (California) Farm Bureau (Murrieta, CA) exists to represent, protect and advance the social, economic and educational interests of the farmers of Riverside County, California. RCFB works for the solution of the problems of the farm, the farm home and the rural community, by use of the recognized advantages of organized action, to the end that those engaged in the various branches of agriculture may have opportunity for happiness and prosperity in their chosen work.

STOP Taking Our Property (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana. These families have been adversely affected for years by capricious applications of

federal environmental regulations. Members of STOP believe that government should be bound by constitutional protections of private property when it enforces regulations pertaining to land use.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership and development.

STATEMENT OF THE CASE

The issue before the Court in this case is whether the court below erred in holding that the U.S. Fish and Wildlife Service has authority, pursuant to the Commerce Clause, to apply Section 9 of the Endangered Species Act (ESA) to the Delhi Sands Flower-loving Fly ("the Fly"), a species found solely within the borders of the state of California and not the subject of any commercial activity.

More fundamentally, however, this case is about whether the federal government has the power to control

innumerable local land-use decisions under the guise of protecting endangered species. In the case at bar, for example, the FWS, acting in effect as a federal "zoning board," became intimately involved in the siting and layout of a local hospital. Judge Sentelle in his dissenting opinion in the court below pointed out the intrusive nature of the application of the ESA in this case:

> Local land-use planning, including the authority to balance environmental concerns with development in a way to best serve citizens' interests, has been disrupted; the financial health of the local governments has been impacted; a local enterprise zone has been threatened; and private land development has been impeded.

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1060 (D.C. Cir. 1997 (J. Sentelle, dissenting).

Such federal intrusion in the land use process plainly upsets the balance of federal and state power envisioned by the Framers. Therefore, it is vital that the Court accept this case for review in order to determine whether such expansive application of Section 9 comports with the limitations on federal power set forth in the Commerce Clause.

SUMMARY OF ARGUMENT

In the Court's recent landmark decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Court sets out the Framers' rationale for including the Commerce Clause, Article I § 8, within the Constitution:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers . . . As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." . . . ". . . a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. at 552 (citations omitted). Moreover, even in *NLRB v. Jones & Laughlin Steel, Corp.*, the decision that initiated the expansion of Congress' Commerce Clause power during the New Deal, the Court held that federal power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

In addition to the provisions of the Commerce Clause, the Constitution explicitly sets forth the restriction in the Tenth

Amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In *New York v. United States*, 505 U.S. 144 (1992), this Court recognized that "[s]tates are not mere political subdivisions of the United States," rather, they retain "a residuary and inviolable sovereignty . . . reserved explicitly to the States by the Tenth Amendment." *Id.* at 188. Moreover, this Court has also held that the Tenth Amendment also provides for a balance between the federal and state governments:

> Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.

Id. at 181.

As set forth below, the effect of ESA Section 9, as applied here, is to create a 'completely centralized' federal system of land use regulation that preempts state and local regulation and upsets the delicate balance between federal and state sovereignty created by the Commerce Clause and the Tenth Amendment. Indeed, if Section 9 were to be construed (as the court below does) as a tool for managing entire 'ecosystems,'

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1058-59 (D.C. Cir. 1997) (J. Henderson, concurring), it is conceivable that every single square inch of land in the United States could be regulated by the federal government pursuant to the ESA because under the ecosystem theory,

> [e]very species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of a larger assemblage.

Id. at 1053 (quoting Edward O. Wilson, *The Diversity of Life* 308 (1992)). If such a theory were taken to its logical end, any action that affects any species, endangered or not, could conceivably affect the 'ecosystems' in which endangered or threatened species exist. As such, the application of the ESA urged by respondent and the court below provides no boundary on the power of the government to regulate the most minute details of everyday land use decisions having at most distant and tangential effects on listed species. The effect of this regulation would be overwhelming federal interference with local land use planning and regulation. Accordingly, it is critical that this Court address these constitutional concerns and provide

guidance for lower courts as to the permissible reach of federal endangered species regulation.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THIS COURT NEEDS TO CLARIFY WHETHER CONGRESS HAS THE POWER PURSUANT TO THE COMMERCE CLAUSE AND THE TENTH AMENDMENT TO REGULATE LOCAL LAND USE DECISIONS.

Historically, state and local governments in this country have held the primary responsibility to enact, maintain, and enforce laws regulating the use of private land. This Court has repeatedly held that the Constitution supports this tradition of state control of land use law pursuant to the police power. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)(holding that zoning regulation falls within the police power); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978)(historic preservation ordinance "substantially related to the promotion of the general welfare. . ."); *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994)("the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge . . .").

This Court has held that the general police power is exclusively reserved to the states and protected by the Constitution. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (declining to expand Commerce Clause authority into federal police power). Zoning and land use planning, as a manifestation of the police power, have been recognized by this Court as "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18 (1975).

Despite the primacy of the states in the regulation of land use, the present application of the ESA Section 9 "take" prohibition to situations involving "habitat modification" has produced a shift in the power to regulate land use from state and local governments to the U.S. Fish and Wildlife Service.

In attempting to enforce the mandates of ESA Section 9 regulating the "taking" of endangered and threatened species, FWS has placed restrictions on the use of non-federal land across the country. In particular, FWS has prohibited landowners from making normal, otherwise legal, use of their property even when that use is not directed against endangered or threatened species simply because the land in question might be habitat for a species listed under the ESA. *See Palilla v. Hawaii Dep't of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) (holding that maintaining sheep and goats on critical habitat for Palilla bird constituted a "take" under Section 9). Moreover, FWS does not limit its oversight to land that contains

protected "habitat" for endangered species, but also 'potential' habitat.[2]

The agency also relies on its regulatory interpretation of Section 9 to restrict the use of land not considered protected habitat if it believes that use of that land might *affect* protected habitat. For example, the FWS has used the broad language of the regulations implementing Section 9 to prevent the development of land that would contribute to "urbanization" which, while not directly affecting any specific animal, would reduce the habitat adjacent to places where the golden-cheeked warbler, an endangered species found primarily in Texas, has been sighted:

> We previously indicated . . . that development of houses along Foxtree Cove could require authorization under the Endangered Species Act. This position was based upon the identification of golden-cheeked warblers in the canyon on both sides of Foxtree Cove and that current

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[2] In a letter to Texas landowner Marge Krueger, a FWS official stated that "[w]e believe this property would be *suitable* habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by [sic] Endangered Species Act. . ." Letter from Sam D. Hamilton, State Administrator, to Marge Krueger, undated (emphasis supplied). The text of the document is appended as Exhibit A. A copy of the original document is lodged with the Clerk of the Court under separate cover.

> biological information indicates that urbanization adversely impacts use of an area by this species.[3]

Development of the above property was never shown to actually "kill or injure" wildlife under the terms of the regulations implementing Section 9, except under an elastic definition of those terms that equates encroaching urbanization generally with killing or injuring endangered species. Such a definition is so broad as to be both all encompassing and meaningless.

Additionally, FWS uses the ESA as justification for regulating a tremendous range of land uses. FWS has provided in its regulatory interpretation of Section 9 no need to prove that a land use actually results in physical injury to an individual member of a species. According to the FWS, the 'modification' of habitat is itself enough to demonstrate that a "take" has occurred. The regulatory interpretation assumes that an endangered species is taken merely when an activity "significantly impair[s] essential behavioral patterns." 50 C.F.R. § 17.3 (1994). The agency, however, has established no clear standard for what constitutes a 'significant impairment' and has interpreted the rule broadly to encompass everyday activities occurring on private property. For example, a Florida rancher received a letter from the FWS demanding the cessation of

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[3] Letter from Sam D. Hamilton, State Administrator, to Lee Sherrod, dated July 9, 1992. The text of the document is appended as Exhibit B.

certain activities that had the "potential to impact Florida scrub jays."[4] There was no confirmation that scrub jays actually occupied or had ever occupied the property, but the rancher was prohibited from clearing land to plant some blueberry bushes for his personal, non-commercial use. The FWS stated:

> This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc. . . . This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

Merriman letter.

A landowner who would face an enforcement action pursuant to Section 9 for using their property in a manner in which FWS disapproves may only escape liability by seeking an "incidental take" permit from FWS under Section 10(a). Such permits are difficult for individual landowners to obtain and often very expensive. Moreover, even where a Section 10(a) permit is issued, the permit may restrict land use more severely

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A copy of the original document is lodged with the Clerk of the Court under separate cover.

[4] Letter from David J. Wesley, FWS Field Supervisor, to Curtis W. Merriman, dated May 13, 1993 ("Merriman letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

than state and local land use regulation would otherwise provide for.

II. THIS COURT NEEDS TO ADDRESS THE ISSUE OF HOW THE PROVISIONS OF SECTION 9 OF THE ESA MAY BE APPLIED IN A WAY THAT PROTECTS THE FIFTH AMENDMENT RIGHTS OF PRIVATE LANDOWNERS.

According to Secretary of the Interior Babbitt, "The Endangered Species Act is an extraordinary piece of legislation because it allows the Federal Government to preserve, maintain, and foster the recovery of endangered species wherever they occur, without regard to geography, location, or land ownership." *National Biological Survey: Hearings Before The Joint House Comm.*, 103rd Cong., 2d Sess. (1993). Due to the broad agency interpretation of what constitutes a "take" pursuant to Section 9, including modification of a species habitat, coupled with the severe civil and criminal sanctions for any violations of the Act, many reasonable and productive uses of private property are being substantially curtailed or terminated altogether by the Act. For example, in order to avoid habitat modification which could "take" a species protected under the Act, landowners have been prohibited from crossing dry creeks in vehicles, cutting trees, clearing brush, using pesticides, planting crops, building homes, grazing livestock, and protecting

livestock from predators. In that way, the Act has in many instances deprived landowners of the only economic uses they can make of their properties—uses which are productive and which contribute to local, regional, and national economies and welfare.

Such cavalier destruction of property rights is in clear derogation of the constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, it is doubtful that the regulatory excesses currently occurring under the ESA would be possible if the government were in fact complying with its constitutional duty to pay for the private property that it takes.

The right to use land is protected by the Fifth Amendment's due process and takings clauses. This Court has explicitly held that the property rights protected by the Fifth Amendment to the Constitution include the rights "to possess, use and dispose" of private property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Ranching, farming and building fences and houses are common and historic uses of private property which cannot be infringed or destroyed by government with impunity. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . ." *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003, 1031 (1992). *See also Dolan v. City of Tigard*, 512 U.S. 374 (1994). Yet the application of the Section 9 "take" provision to development on non-federal land, such as the county hospital at issue in the case at bar, often allows the government to do just that by depriving individuals of the right to make normal and common uses of their land, without just compensation.

This Court has left no doubt that regulatory schemes, no matter how laudable, which result in the taking of private property must be compensated. As Justice Oliver Wendell Holmes warned back in 1922: "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

Application of the ESA in this case demonstrates the inherent conflict between the use of the ESA as a *de facto* federal land use planning law and the overriding goal of the Constitution, namely, the creation of a system of governance balanced between the federal and state governments. Accordingly, *amici curiae* hereby respectfully urge this Court to grant the petition for a Writ of Certiorari and resolve this significant constitutional conflict.

Respectfully submitted,

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Christopher J. Oberst
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PROPERTY RIGHTS
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April 6, 1998

APPENDIX

Exhibit A

United States Department of the Interior
FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot in Jester Point, Phase I, or 7101 Foxtree Cove, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federal listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a

federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

[s/]Sam D. Hamilton
Sam D. Hamilton
State Administrator

Exhibit B

United States Department of the Interior
FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Jul 09 1992

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

By letter dated May 12, 1992, you requested a re-evaluation of our previous position on the Foxtree Cove portion of Jester Estates in Austin, Travis County, Texas. Enclosed with your letter was information relating to golden-cheeked warbler sightings in 1991 and 1992.

We previously indicated in letters dated July 16, 1990, June 21, 1991, and July 25, 1991, that development of houses along Foxtree Cove could require authorization under the Endangered Species Act. This position was based upon the identification of golden-cheeked warblers in the canyon on both sides of Foxtree Cove and that current biological information indicates that urbanization adversely impacts use of an area by this species.

The information in your letter did not provide new biological information regarding development impacts on or use of the area by the golden-cheeked warbler. It reconfirmed the use of the canyons adjacent to Foxtree Cove by this species. Therefore,

our original position, that authorization under the Endangered Species Act would be required, remains unchanged.

If you have any questions regarding this response, please contact Joe Johnston at (512) 482-5436.

Sincerely,

[s/]Sam D. Hamilton
Sam D. Hamilton
State Adminstrator

Exhibit C

United States Department of the Interior
FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216
[MAY 13 1993]

CERTIFIED MAIL

Curtis W. Merriman
319 East Main Street
Avon Park, FL 33825

Dear Mr. Merriman:

This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc., bordered on the west by Highway 64 and on the south by Laflam Road, in Highlands County. This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

In accordance with the Endangered Species Act of 1973, as amended (Act), only two avenues are available to legally "take" a listed species, such as the scrub jay. "Take," as defined in the Act, means "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." One avenue is through the Section 7 consultation process using the Incidental Take statement in the Biological Opinion. In order to use the Section 7 process, a Federal agency must be involved in the project. If a Federal agency is not involved, the other method available is obtaining a Section 10(a)(1)(B) permit by developing a Habitat Conservation Plan in

accordance with Section 10 of the Act. "Taking" a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act. I have enclosed copies of the Act and the Section 10 regulations for your information.

We recommend you contact Dawn Zattau, of my staff, to determine if "take" will result from you project. The number is 904-232-2580.

Sincerely yours,

[s/]David J. Wesley
David J. Wesley
Field Supervisor

Enclosures